

EXHIBIT 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

CATHERINE ALEXANDER,

Plaintiff,

vs.

No. 3:18-cv-966-MJR-DGW

TAKE-TWO INTERACTIVE SOFTWARE, INC.,
2K GAMES, INC.; 2K SPORTS, INC.; WORLD
WRESTLING ENTERTAINMENT, INC.;
VISUAL CONCEPTS ENTERTAINMENT;
YUKE'S CO., LTD.; AND YUKE'S LA, INC.,

Defendants.

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VIDEOTAPED DEPOSITION OF RYAN CLARK

September 12, 2019

St. Louis, Missouri

Reported by:

Pamela Watson Harrison

Job no: 26039

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1 A. Yeah, I do recall that. It was part of
2 a video game of how -- how they do that, how the
3 video game designers are able to mimic their
4 moves. It's -- and it just stuck in my memory
5 because that makes sense to me because it's like
6 how would you do that, and without having them
7 hooked up to some kind of software computer to be
8 able to do that, right, because otherwise you'd
9 have to draw it out and I think that would be
10 pretty time-consuming. I'm not a video game
11 expert. I will admit that.

12 Q. Have you spoken with any of the other
13 experts in this case?

14 A. No.

15 Q. You haven't spoken with Mr. Zagal?

16 A. No.

17 Q. You did review Mr. Zagal's report in
18 this case, right?

19 A. Correct.

20 Q. Did you also review Mr. Zagal's
21 deposition transcript?

22 A. No.

23 Q. You do offer some opinions on design
24 choices in your report, right?

25 A. No.

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1 Q. So you do not have any opinion on design
2 choices?

3 MR. FRIEDMAN: Object to form.

4 QUESTIONS BY MR. ILARDI:

5 Q. In the WWE 2K games.

6 MR. FRIEDMAN: Same objection.

7 A. Can you read the question back to me?

8 QUESTIONS BY MR. ILARDI:

9 Q. You do not have any opinion on the
10 design choices made in the WWE 2K games?

11 MR. FRIEDMAN: Same objection.

12 A. My opinions are in my report, and
13 they're rebuttal opinions of Mr. Malackowski; and
14 I don't have an opinion on a design of a game.

15 MR. FRIEDMAN: Counsel, we've been going
16 for about an hour.

17 MR. ILARDI: Sure.

18 MR. FRIEDMAN: If you're starting a
19 new --

20 MR. ILARDI: Yeah.

21 MR. FRIEDMAN: -- session --

22 MR. ILARDI: Fair enough. If you'd like
23 a break, I'm happy to accommodate.

24 THE WITNESS: Sure.

25 MR. ILARDI: Okay.

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1 THE VIDEOGRAPHER: This ends media
2 number 1. We're off the record. It is 9:56 a.m.

3 (Off the record from 9:56 a.m.
4 until 10:05 a.m.)

5 THE VIDEOGRAPHER: This begins media
6 number 2. We're back on the record. It is
7 10:05 a.m.

8 QUESTIONS BY MR. ILARDI:

9 Q. Mr. Clark, before we broke, we were
10 talking earlier this morning about the fact that
11 you have played video games before?

12 A. Correct.

13 Q. And do you enjoy playing them?

14 A. Yes.

15 Q. Are video games a form of art?

16 A. I don't have an opinion on that. I
17 don't know what you mean by that.

18 Q. You do have opinions on whether or not
19 realism is important to consumers of video games;
20 is that correct?

21 A. Based off of Dr. Zagal's report. And in
22 realism being a driver of consumer demand and
23 essentially based off of what Dr. Zagal has opined
24 to.

25 Q. You're not offering any of your own

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1 opinion on whether realism drives consumer
2 demands?

3 A. No.

4 Q. And do you offer any opinions beyond
5 what Mr. Zagal talks about, about the video game
6 industry?

7 A. Well, my opinions are separate from
8 Dr. Zagal's opinions, and I believe where it is --
9 there's some overlap is on the tattoos and
10 Mr. Malackowski's opinion that zero profits and
11 sales are attributable to, you know, the tattoos.

12 Q. You do offer opinions on the concept of
13 whether the profits are attributable to the
14 tattoos?

15 A. Yes.

16 Q. To be clear, when I say "the," I mean
17 you offer opinions on whether Take-Two's profits
18 are attributable to the tattoos?

19 A. That's correct. I agree with
20 Mr. Malackowski that zero -- or zero contribution
21 of the accused tattoos.

22 Q. In your opinion, there is some
23 contribution of the accused tattoos to Take-Two's
24 profits in selling WWE 2K?

25 A. Yes.

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1 Q. And, specifically, in WWE 2K, there are
2 many design choices made for that game?

3 A. Okay.

4 Q. And is it your opinion that every single
5 design choice could possibly impact Take-Two's
6 profits?

7 A. No.

8 Q. So there is some sliding scale about
9 which -- which design choices impact profits and
10 which ones won't?

11 MR. FRIEDMAN: Objection. It
12 mischaracterizes.

13 A. I haven't referenced a sliding scale.
14 You have to clarify what you mean by that.

15 QUESTIONS BY MR. ILARDI:

16 Q. So you agree that there are some design
17 choices that are not going to have an impact on
18 Take-Two's profits?

19 MR. FRIEDMAN: Objection. Asked and
20 answered.

21 A. As I mentioned previously, I haven't
22 done an analysis of the numerous design choices
23 and their impact on profits.

24 QUESTIONS BY MR. ILARDI:

25 Q. It's possible that if the designers

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1 added or had a crowd size of 10,001 instead of
2 10,000, that extra one person is going to impact
3 Take-Two's profits?

4 A. It's possible that it will?

5 Q. That's my question.

6 A. Again, I don't -- I don't know if it
7 would or would not. I've not done that analysis.

8 Q. What analysis on design choices have you
9 done?

10 A. So I am not -- as I mentioned earlier,
11 I'm not a video game designer. Just a user,
12 player of the games. And my opinions are related
13 to the economics, the damages in this case. It's
14 Dr. Zagal who has opinions on the design choices
15 in the game and the impact those design choices
16 would have on the game itself as well as sales and
17 profits of those games.

18 Q. But you do offer an opinion that the
19 inclusion of specific tattoos on the Orton
20 character in the WWE 2K series was motivated by a
21 desire to increase profits?

22 A. My opinion is I disagree with
23 Mr. Malackowski that none of the profits of
24 Take-Two are attributable to the accused tattoos,
25 based on the testimony and facts in evidence in

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1 Q. You also haven't done an analysis on how
2 the depiction of the -- depiction of the tattoos
3 in the accused video games impacts Take-Two's
4 profits?

5 A. That's correct.

6 Q. Can you describe for me what your
7 assignment was in this matter?

8 A. Yes. And it's outlined in my report
9 under Section 1.2.

10 Q. Okay.

11 A. And it was to provide an analysis of the
12 validity and reliability of the opinions of the
13 defendants' damages expert, James Malackowski.

14 Q. And fair to say that your report
15 contains all of your opinions concerning
16 Mr. Malackowski's damages opinions?

17 A. Yes.

18 Q. Is everything that you disagree with
19 Mr. Malackowski in your report?

20 A. No.

21 Q. There are things other -- there are
22 things not written in your report -- actually, let
23 me rephrase that.

24 There are things that Mr. Malackowski
25 has opined on that you disagree with but that you

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1 portrayal of athletes and characters in these
2 video games and the degree that the video game
3 designers will go to achieve that realism for
4 their consumers.

5 Q. But this is about a video game that's
6 not part of the present lawsuit?

7 A. That's correct.

8 Q. As for Mr. Orton, you have no opinion on
9 whether his tattoos are part of his persona and
10 identity?

11 A. That's correct.

12 Q. And as for Mr. Orton, you have no idea
13 whether it -- if his tattoos weren't shown,
14 whether it would really be a depiction of
15 Mr. Orton?

16 A. That's correct.

17 Q. You say you have -- you've seen
18 wrestling matches before, right?

19 A. Correct.

20 Q. And agree that professional wrestlers --
21 they do their wrestling in public?

22 A. Okay. Correct.

23 Q. When they're in real life, when their
24 wrestling's at an arena, the crowd can see them?

25 A. Correct.

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1 direct or variable costs associated with
2 manufacturing those products.

3 Q. In this lawsuit, you did not attempt to
4 make an allegation of those -- of the direct and
5 variable costs associated with the accused video
6 games?

7 A. I don't have the information to do it.

8 Q. Well, you said in another case you used
9 a 10-K to do that, right?

10 A. I clarified that and said that I used
11 the companywide financial statements. We had an
12 account-by-account analysis, was able to talk to
13 the controller of the business, and talk about the
14 components, the various expense items, and ran a
15 couple other calculations that we typically use to
16 determine direct costs associated with operating
17 overhead.

18 In this case it's a manufacturer, so
19 that makes sense. Here, you know, my
20 understanding is a lot of these games are put
21 together by an outside party. So, you know, I
22 understand that they have a marketing budget and
23 they track that. That seems appropriate as a
24 direct expense. But as I mentioned, here, the
25 gross profit margin is substantially lower than --

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1 than the total company, and I have no way of
2 checking it, understanding of why that is.

3 You can't -- to answer your question,
4 you can't do it with the 10-K. And I didn't do it
5 with the 10-K. I haven't -- I am not representing
6 that their profit margin should what the 10-K is.
7 I want to be clear on that.

8 Q. So to be clear, your opinion is not that
9 Take-Two's profit margins for the accused video
10 games are what the companywide profit margins are
11 as reported in the 10-K?

12 A. I never wrote that. Or I never
13 testified to that. It's what Mr. Malackowski said
14 in his report and wrote in his report, and that's
15 where I was mentioning I disagree with that.

16 Q. What additional, I guess, document was
17 required to track direct and variable costs for
18 the accused video games?

19 A. Well, what additional documents would I
20 like to review, I guess, is your question; and I
21 would want -- I would want to know what overhead
22 has been allocated. I would want to take that out
23 of the cost of sales, and then do an analysis on
24 the operating expense.

25 Now, we -- they're representing that the

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1 A. That's correct.

2 Q. Do you provide any opinions on how much
3 higher those costs are?

4 A. No.

5 Q. Did you calculate the delta between the
6 10-Ks and the information reported in Exhibit 2?

7 A. Yes.

8 Q. And did you include that information in
9 your report?

10 A. No.

11 Q. Do you intend to testify as to that
12 information at trial?

13 A. Yes.

14 Q. And you are aware that your report has
15 to contain all of the facts and bases for your
16 opinions that you intend to testify at trial?

17 A. I understand as rebuttal expert my
18 opinion is I disagree with Mr. Malackowski's
19 calculation of 2K's gross profits and that's my
20 opinion, and the basis for that is his report and
21 what he relies upon in his report. And as far as
22 explaining, I've explained some of that in my
23 report as well as here at deposition.

24 Q. So in -- your testimony is that by
25 saying Mr. Malackowski's calculation is wrong, you

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1 are now allowed to testify at trial as to any
2 reason you think that's wrong regardless of
3 whether that reason appears in your report?

4 A. I think as long as it is within the
5 opinion of my opinion on his calculation of gross
6 profit and explanation of why it's incorrect, yes,
7 I believe I can provide an explanation for that.

8 Q. Certainly you wouldn't just write a
9 report saying "I disagree with Mr. Malackowski"
10 and expect to then be able to testify later why
11 you disagreed, right?

12 A. Yes. And I've notated why I disagree.
13 But here's the challenge, is I don't have it
14 quantified of what the actual number is because I
15 don't -- the data is insufficient to do so. So
16 how can I opine on why I disagree with him when I
17 don't have the information to be able to provide
18 the explanations of that?

19 Q. You've provided new opinions today about
20 overhead allocation, right?

21 A. It's not a new opinion. My opinion is I
22 disagree with his gross profit calculation, one of
23 the reasons being it includes -- appears to
24 include an allocation of overhead.

25 Q. And that reason that you just stated

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1 their gross profit, which I mentioned I do not
2 agree with the calculation of gross profit. And
3 one of the reasons could be because there's an
4 overhead allocation in that number.

5 Q. In the report, the full basis for your
6 disagreement with the calculation of gross profits
7 does not include a disagreement with overhead
8 allocation, correct?

9 A. That's correct, because all I had at the
10 time of my report was Document 1332 and a
11 description of cost of goods sold including
12 overhead allocation and that's it.

13 Q. Your criticism of overhead allocation
14 today is no different than one you could have
15 provided at the time you put it in your report?

16 A. That's true because no additional
17 information has been provided. That's a correct
18 statement.

19 Q. Are there other criticisms of
20 Mr. Malackowski's opinion that you have that you
21 did not include in your report but you plan to
22 testify to at trial?

23 A. Yes. Under second opinion B, where I
24 disagree with Mr. Malackowski's calculation of
25 Take-Two's operating profit earned from its sale

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1 of accused video games. And to explain, I've
2 notated that he's included [REDACTED]
3 [REDACTED], and
4 I believe he's included indirect expenses in his
5 calculation. So, therefore, his calculation of
6 operating profit is incorrect.

7 Q. Is that opinion written in your report?

8 A. Yeah. But it's footnoted and implied.

9 Q. Is it your testimony that you are
10 going -- that you at trial will testify as to
11 implied opinions?

12 A. Well, my -- so you keep asking me about
13 opinions within my opinions and I have three
14 opinions, and I plan to testify on those three
15 opinions; and when asked questions about why I
16 disagree with Mr. Malackowski in those three
17 areas, I'm going to provide that testimony. I
18 didn't write down every bit of expected testimony
19 in that area.

20 Q. So it's fair to say you did not write
21 down every reason that you have for your three
22 opinions?

23 MR. FRIEDMAN: Object to form.

24 A. I would say that's not correct. I was
25 careful not to make a statement that was not

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1 Take-Two's finance person, Mr. Charleton. So I
2 don't have that information. I also don't have
3 the information of the internal financial
4 statements that it's my understanding this
5 document could be reconciled with. So he --
6 Mr. Malackowski didn't include that. So have the
7 same criticism of him.

8 Q. I'm asking you if you are now saying you
9 are going to testify at trial as to facts or
10 reasons that are not explicitly included in your
11 report.

12 A. I disagree with that.

13 Q. But you do agree that at least the
14 overhead allocation criticism is not explicitly
15 written in your report?

16 A. It's encompassed in the first and second
17 opinion that I disagree with Mr. Malackowski's
18 gross profit and operating profit calculations.

19 Q. I'm not able to ask you questions about
20 the reasons that you haven't written in your
21 report or that you haven't told me about today; is
22 that fair?

23 A. That's fair.

24 Q. If you had not raised overhead
25 allocation this morning, it's fair to say that I

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1 may not have even been able to ask you questions
2 about it?

3 A. Okay.

4 Q. So are there other -- are there other
5 areas or other reasons you have that you disagree
6 with Mr. Malackowski that you plan on testifying
7 to at trial?

8 A. Not that come to mind right now.

9 Q. The only additional -- the only new
10 opinion is about overhead allocation?

11 A. It's not --

12 MR. FRIEDMAN: Objection.
13 Mischaracterizes.

14 A. Right. It's not a new opinion.

15 QUESTIONS BY MR. ILARDI:

16 Q. Is it a new criticism?

17 A. No.

18 Q. Is it a criticism not within your
19 report?

20 A. It is a criticism that is not written in
21 my report.

22 Q. Okay. If you look at the second
23 sentence in Section 3A, it says: "Interestingly,
24 Take-Two recorded the company earned gross profits
25 of 45.1 percent of total net revenue for the

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1 period covering April 2015 through March 31, 2018,
2 see attached Exhibit C, Schedule 301."

3 Is that right?

4 A. Yes.

5 Q. Exhibit C, Schedule 301, is information
6 based off of Take-Two's 10-Ks for the fiscal year
7 2017 to 2018?

8 A. And 2016.

9 Q. Right. But you only --

10 A. Correct.

11 Q. So you cited 2017. That includes all
12 the way back to, I think, 2015 or 2016?

13 A. To 2016, correct.

14 Q. It goes back several years?

15 A. Correct.

16 Q. The next -- the next sentence in 3A is:
17 "The external development costs, license, internal
18 royalties, internal development costs included in
19 Mr. Malackowski's gross profits calculations are
20 significantly higher as a percentage of total net
21 revenue than the amounts reported on Take-Two's
22 Form 10-Ks."

23 And that information again comes from
24 Take-Two's Form 10-Ks compared to
25 Mr. Malackowski's calculation, correct?

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1 A. Correct.

2 Q. The next sentence you report on what the
3 10-K reported; that "The software and development
4 costs and royalties included 24.6 million and
5 21.1 million of stock-based compensation expense
6 in 2018 and 2017, respectively."

7 Once again, that information comes from
8 Take-Two's Form 10-K, right?

9 A. Correct.

10 Q. And then you also include a sentence:
11 "Take-Two reported its research and development
12 costs increased for the fiscal year ended
13 March 31, 2018, as compared to the prior year due
14 primarily because of increased personnel expense
15 due to increased head count including our
16 acquisition of Social Point and higher stock-based
17 compensation."

18 A. Correct.

19 Q. The information for that sentence,
20 again, comes from Take-Two's Form 10-K?

21 A. Correct.

22 Q. And the only other sentence that appears
23 in this section is your statement:

24 "Mr. Malackowski's calculation of Take-Two's gross
25 profits erroneously includes costs not directly

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1 Q. On the tables on pages 28 through 29?

2 A. No. But in the footnotes of the 10-K.

3 Q. Right. Okay. If you look back at
4 page 27.

5 A. Okay.

6 Q. This has a listing of product releases
7 for 2018, right?

8 A. Yes.

9 Q. And this lists a number of different
10 video games, correct?

11 A. Correct.

12 Q. Do you know how many video games
13 Take-Two has sold -- how many different types of
14 video games Take-Two has sold since 2015?

15 A. No.

16 Q. How many -- how many different titles
17 Take-Two has sold since 2015?

18 A. No.

19 Q. On this list, I think there are -- I
20 counted about 10 different titles. You can check
21 me on that. But it's fair to say Take-Two has at
22 least 10 different titles in 2018?

23 A. That's fair to say, yes.

24 Q. And those titles do not, as far as you
25 know, encompass every title that they released

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1 or this analysis, are you relying, then, on your
2 own expertise?

3 A. Well, I mean, yes. An expertise in
4 working in these types of engagements, having
5 experience in reviewing other expert reports and
6 understanding other types of technology. I have
7 to be able to do that to understand the facts and
8 circumstances surrounding the alleged
9 infringement. So, you know, I'm able to also have
10 the benefit of having experts in those fields to
11 be able to explain and provide additional
12 information in areas that I'm not an expert in.
13 That also ties in with the damages.

14 Q. In this sentence, you're not providing
15 any additional information, are you?

16 A. Which sentence?

17 Q. The sentence that starts with "one way
18 the developers" and continues on, the second
19 sentence in Section 3D.

20 A. Okay.

21 Q. In that sentence, you're not providing
22 any additional opinion or expertise beyond what's
23 already been stated in this case?

24 A. I'd agree with that, yes. An
25 observation.

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1 A. Correct.

2 Q. And here you have declined to provide
3 any percentage?

4 A. I have not, that's correct. I have not
5 provided -- I haven't declined. I have disagreed
6 with Mr. Malackowski that it is zero percent.

7 Q. That means, in your opinion, if
8 Mr. Orton's character was shown without his
9 tattoos, that would negatively impact Take-Two's
10 profits?

11 A. Yes.

12 Q. And people would buy -- people would
13 buy -- let me rephrase that.

14 There would be less sales of the accused
15 video games if Mr. Orton was shown without the
16 tattoos in the accused video games?

17 A. That's not my opinion. That's
18 Dr. Zagal's opinion that there would be less
19 sales. But it seems like a reasonable opinion and
20 a reasonable basis for that, I believe.

21 Q. There's some number of consumers who
22 otherwise would have purchased WWE 2K who now
23 would not purchase it if Mr. Orton was not shown
24 with his tattoos?

25 A. I think that is a true statement

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1 because, essentially, what is being quantified
2 is -- what the other experts are trying to
3 quantify is what that profit contribution
4 percentage is. And if it's something greater than
5 zero, then what's been concluded is that there
6 is -- copyrighted work is contributing to the
7 profits of the company and if -- you know, profits
8 of company of sales and expenses. I think that's
9 an accurate statement.

10 Q. Are there some people who buy WWE 2K
11 because of the tattoos that appear on Mr. Orton?

12 A. So, again, you're getting outside of my
13 area of my opinions.

14 Q. Well, the way I read your opinions, I
15 don't think we are -- unless you're not going to
16 offer the opinions in Section 3D, you do offer
17 opinions that the design choices, including the
18 tattoos, had an impact on profits, don't you?

19 A. Yes, based off of the expert in the
20 video game industry, based off of some survey data
21 from Take-Two's video game surveyor. There was
22 some percentage of the consumers that valued, you
23 know, the realism of characters; and that's
24 something that I'll leave to those experts to talk
25 about.

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1 3 percent of the respondents to the survey stated
2 that the game's realism or lifelike characters was
3 the main reason for buying the game."

4 Do you see that?

5 A. Yes.

6 Q. And you reviewed Dr. Jay's report in
7 preparing your report; is that correct?

8 A. That's correct.

9 Q. In your opinion, is Dr. Jay's survey
10 reliable?

11 A. I don't have an opinion on it.

12 Q. You do rely on it, though, don't you?

13 A. As does Mr. Malackowski, yes.

14 Q. You do not have opinion on reliability
15 of Dr. Jay's survey, but you do rely on it to
16 support your opinion?

17 A. It's part of my opinion that part of
18 Mr. -- sorry -- Dr. Jay's survey there were some
19 responses related to the reason for buying the
20 game, the realism of it, of the characters, as
21 well as is the depiction of Mr. Orton in the game.

22 Q. Did you attempt to analyze whether
23 Dr. Jay's findings were reliable on something that
24 you can provide -- you can rely on to provide an
25 opinion?

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1 that information is not available.

2 QUESTIONS BY MR. ILARDI:

3 Q. So it's not your opinion that consumers
4 purchased the game because of Mr. Orton's tattoos?

5 MR. FRIEDMAN: Object to form.

6 A. I don't have -- that's -- my opinions
7 are right here. So I disagree with
8 Mr. Malackowski's opinion that none of the profits
9 of Take-Two are attributable to the depiction of
10 tattoos in the accused video games.

11 QUESTIONS BY MR. ILARDI:

12 Q. And you don't have any opinion, one way
13 or the other, whether that has anything to do with
14 people purchasing the games because of the
15 tattoos?

16 A. That's right. Because that's out --
17 that's out of my area of expertise. That's --
18 that's for the video game experts, their opinions,
19 their testimony. That's outside of my area.

20 Q. Is that a different area of expertise
21 than opining that there are some profits
22 attributable to the depiction of the tattoos in
23 the accused video games?

24 A. You're just asking the question in a
25 different way. So I don't know. My opinion is

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1 that there has to be some profit contribution
2 based off -- I'm relying upon the evidence in the
3 case and another expert that is opining that
4 Take-Two's sales and profits would have been
5 negatively affected if Mr. Orton's tattoos were
6 not included in the game.

7 Q. Is Section 3D within your area of
8 expertise?

9 A. Yes. Because it's -- it relates to the
10 profits. I disagree that it's zero.
11 Mr. Malackowski is just concluded that, that it's
12 zero, and I believe that it's not because it's --
13 because of the other testimony available in the
14 case.

15 Q. So what -- what within your area of
16 expertise are you opining on in Section 3D?

17 MR. FRIEDMAN: Object to form.

18 A. So as an expert in damages and
19 economics, as we talked about earlier, there's
20 technical issues, in this case, software design
21 issues that other experts opine on that can rely
22 upon that. That's what I've done.

23 Mr. Malackowski -- my criticism is that he
24 disregards Dr. Jay's survey data and essentially
25 opines that none of the profits are attributable

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1 to the copyrighted tattoos.

2 QUESTIONS BY MR. ILARDI:

3 Q. So I'm clear on this, the area of
4 expertise that you have in Section 3D is
5 interpreting Dr. Jay's survey data?

6 A. No.

7 MR. FRIEDMAN: Objection.
8 Mischaracterizes.

9 A. No. No, that's not what I said.

10 QUESTIONS BY MR. ILARDI:

11 Q. Then can you list for me what within
12 Section 3D is not you just saying what another
13 expert said?

14 A. The quote from LeBron James'
15 declaration.

16 Q. The quote from LeBron James'
17 declaration.

18 Is there anything else?

19 A. And everything else is my understanding
20 of the facts in the case, my understanding of the
21 opinions of both sides in the case, and the survey
22 data in the case. And I disagree with
23 Mr. Malackowski that it's zero contribution to
24 profits. I have not quantified it. I simply
25 disagree with him.